(1-35V (3)

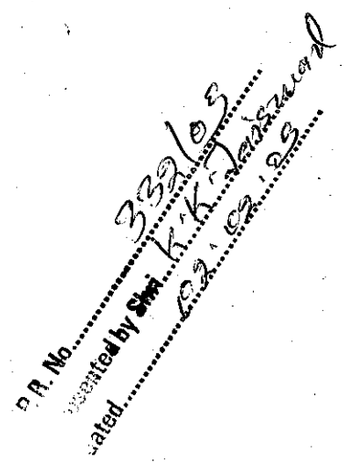
IN THE HIGH COURT OF CHHATTISGARH
AT – BILASPUR

Single Bench

S.A. No. 107 / 2005

Valued at RS.320.00
Court fee affixed RS.35.00

APPELLANTS:



Chandmal, son of late Shri Bhawrimal, Hindu (Jain), resident of village Kera, tehsil Janjgir **(Dead)** through

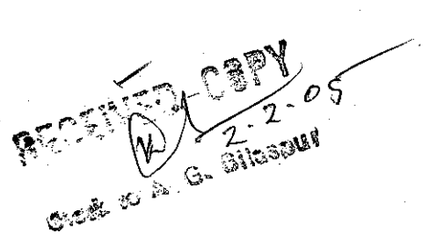
1. Anil Kumar Jain, aged 41 years, son of late Shri Chandmal Jain,
2. Smt. Ratna Devi, aged 76 years, wife of late Shri Chandmal Jain,

Both residents of village Naila, tehsil Janjgir, district Janjgir-Champa (C.G.)

(***Plaintiffs/Appellants***)

VERSUS

RESPONDENTS:



(1) Smt. Kamla Bai, aged 72 years, wife of late Shri Hajarimal,
(2) Rajendra Kumar, aged 52 years, son of late Shri Hajarimal,

Both Hindu (Jain), residents of Kamla Niwas, Man Talaiya, behind Nagar Nigam Dispensary, Jabalpur, tehsil & district Jabalpur (M.P.)

(3) Narendra Kumar, aged 30 years, son of late Shri Hajarimal, Hindu Jain, S.D.E. (civil), resident of Irrigation colony, Gondiya, village Fireman Manendragarh, district Sarguja (Chhattisgarh), at present address- Opposite Dr. Deshpandey, Gopal Nagar, Nagpur (Maharashtra)
(4) Dilip Kumar, aged 48 years, son of late Shri Hajarimal, Hindu (Jain), Fireman, Manendragarh, at present address - Superintending Engineer, A.C.C.L., at/P.O. Katkona, district Koriya (C.G.).
(5) State of Chhattisgarh, through the Collector, Janjgir-Champa, district Janjgir-Champa (C.S.).

(***Defendants/Respondents***)

SECOND APPEAL UNDER SECTION 100 OF THE CODE OF CIVIL PROCEDURE, 1908.

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HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.107/2005

Chandmal (dead) through
L.Rs. Anil Kumar Jain and another

Vs.

Smt. Kamlabai and others

ORDER

Post for 25.8.2005

Sd/-
Sunil Kumar Sinha
Judge

Seen. L.
Advocate
(Somnath Verma)
Counsel for Appellants
25.8.2005

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HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.107/2005

Chandmal (dead) through
L.Rs. Anil Kumar Jain and another

Vs.

Smt. Kamla Bai and others

Shri Somnath Verma, counsel for the appellants.

ORDER
(25.8.2005)

Sunil Kumar Sinha, J.

This appeal arises out of the judgment and decree dated 30.11.2004 passed in First Appeal No.22-A/2004 by the 3rd Addl. District Judge (F.T.C), Janjgir, which was filed against the judgment and decree dated 19.9.2002 passed in civil suit No.51-A/2002 by the First Civil Judge, Class-II, Janjgir.

(2) Briefly stated facts are that the original plaintiff namely Chandmal filed a civil suit for declaration of his title on the suit lands alongwith a declaration that the purchaser of the land namely late Hajarimal was only a *benamidar*. It was further claimed that the possession of the suit property may also be delivered to the plaintiff.

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This suit was filed on 16.3.1982. Later on by way of amendment dated 27.9.1988 an additional plea of perfection of title by adverse possession was also added by the plaintiff and the relief was amended to the extent that the plaintiff be declared as the owner of the suit property on the basis of perfection of his title by way of adverse possession. The original plaintiff died during the pendency of the suit and was substituted by his legal representatives on 13.12.2001. The plaint allegations are that the suit lands were purchased by the plaintiff out of his own earnings and late Hajarimal was only a *benamidar*. Hajarimal was the uncle of the original plaintiff, therefore, the sale deed was executed on his name, but he never contributed any amount of consideration for purchase of the aforesaid property. The suit property was purchased through a registered sale deed dt.12.1.1968 and the plaintiff alone remained in actual physical possession of the suit property. Therefore, he became the absolute owner of the suit property by perfecting his title by way of adverse possession.

(3) The defendants, who are the successors of late Hajarimal, filed their written statement denying the contentions of the plaintiffs. It was pleaded by them that the suit lands were the self acquired property of late Hajarimal who remained in its possession as a purchaser. He was not a *benamidar* of the plaintiff Chandmal. Since

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the plaintiff was not at all in possession of the suit property, therefore, question of perfection of title by adverse possession does not arise.

(4) The learned trial Court framed various issues in this case and after recording the evidence of the plaintiffs' side, as the defendants became ex-parte after filing of the written statement, dismissed the suit of the plaintiffs holding that the plaintiff could not prove that he was the real purchaser of the suit property and late Hajarimal was only a *benamidar*. It was also held that the plaintiff was neither in actual physical possession of the suit properties nor he has perfected his title by way of adverse possession.

(5) Against the aforesaid judgment and decree passed by the trial Court, the legal representatives of the original plaintiff filed the first appeal before the lower appellate Court and the lower appellate court also dismissed their appeal confirming the judgment and decree passed by the trial Court. It is against the aforesaid judgment and decree, passed by the appellate court, the plaintiffs have filed this second appeal under section 100 of the Code of Civil Procedure.

(5) Shri Somnath Verma, learned counsel for the appellants submits that the trial court as well as the lower appellate court erred in law in holding that the plaintiff could not establish that he was real

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purchaser of the suit property and late Hajarimal was only a *benamidar*. He also submits that the courts below further erred in law in holding that the plaintiff was not in actual possession of the suit property and he has not perfected his title by way of adverse possession.

(6) I have heard learned counsel for the party at length and have also perused the records of the two courts below.

(7) The Apex Court has held in the matter of ***Valliammal (D) by LRs. -vs- Subramaniam and others (2004) 7 SCC 233*** that there is a presumption in law that the person who purchases the property is the owner of the same. This presumption can be displaced by successfully pleading and proving that the document was taken *benami* in the name of another person for some reason, and the persons whose name appears in the document is not the real owner, but only a *benami*. The Apex Court held that heavy burden lies on the person who pleads that the recorded owner is a banami-holder. The Apex Court has further held that out of the six indicia to determine the question whether a particular sale is benami or not, as mentioned in ***Jaydayal Poddar (Deceased) through L.Rs. and another -vs- Mst. Bibi Hazra and others (1974) 1 SCC 3***, the source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether

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the sale standing in the name of one person, is in reality for the benefit of another. What are the six circumstances stated in the case of Jaydayal Poddar (supra) are mentioned hereinbelow:-

(i) the source from which the purchase money came;

(ii) the nature and possession of the property, after the purchase;

(iii) motive, if any, for giving the transaction a benami colour;

(iv) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;

(v) the custody of the title deeds after the sale and

(vi) the conduct of the parties concerned in dealing with the property after the sale.

If we apply these principles in the present case and test the validity of the judgments passed by the two courts below, it would appear that the plaintiffs could not prove the fact that the original plaintiff was the real owner of the suit properties and late Chandmal was the *benamidar* of the same. I do not find any merit in the arguments advanced by learned counsel for the appellant and the same cannot be accepted.

(8) The second point about the adverse possession is also not established by the plaintiffs' case. There is no iota of evidence in this

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case that the plaintiff ever remained in the actual physical possession of the suit properties to the exclusion of the title of the defendants so as to give right in favour of the plaintiff to raise a plea of perfection of title by way of adverse possession. The trial court as well as the lower appellate court have rightly held that the original plaintiff or his legal representatives were never in possession of the suit properties and the plaintiffs could not establish their claim on the basis of doctrine of adverse possession. I do not find any reason to interfere with the judgment and finding of the two courts below on this point also. Learned counsel for the plaintiffs could not point out any perversity in the concurrent findings recorded by the two courts below in relation to these two points, either in relation to plea of *benami* or in relation to adverse possession.

(9) The second appeal can only be entertained on a substantial question(s) of law. As to which would constitute a ~~constitute~~ a substantial question of law, it has been observed by the Apex Court in case of ***Santosh Hazari -Vs- Purushottam Tiwari (Deceased) by L.Rs. (2001) 3 SCC 179*** that "a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be " substantial " a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the

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case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

(10) As above, a perusal of section 100 C.P.C. makes it clear that the scope and exercise of jurisdiction by the High Court in the second appeal under section 100 is limited to the substantial questions of law framed at the time of admission of the appeal or additional substantial questions of law framed at the later stage after recording reasons for the same. This makes it clear that the existence of substantial questions of law is *sine qua non* for the exercise of jurisdiction under the amended provisions of section 100 C.P.C. (***Please***

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see (2004) Vol.V SCC 762 - Thiagarajan and others -vs- Shri Venugopala Swamy B. Koil and others)

(11) I do not find any reason to interfere in the concurrent findings recorded by the two courts below. This appeal does not involve any substantial question of law and the same cannot be entertained. It is dismissed at the admission stage itself. No costs.

Sd/-
Sunil Kumar Sinha
Judge

Rao